

July 2004

MJI Publication Updates

**Child Protective Proceedings Benchbook
(Revised Edition)**

**Criminal Procedure Monograph 5—
Preliminary Examinations (Revised Edition)**

**Criminal Procedure Monograph 6—Pretrial
Motions (Revised Edition)**

Domestic Violence Benchbook (3rd Ed)

**Friend of the Court Domestic Violence
Resource Book (Revised Edition)**

Juvenile Justice Benchbook (Revised Edition)

Sexual Assault Benchbook

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 5

Notice & Time Requirements

5.3 Issuance and Service of Summons

B. Manner of Service of Summons

Insert the following case summary on the bottom of page 131 after the summary of *In re Mayfield*:

In *In re Zaherniak*, ___ Mich App ___, ___ (2004), the Court of Appeals discussed an apparent conflict between MCR 3.920 and MCL 712A.13. MCR 3.920(B)(4)(b) provides that the court may find “on the basis of testimony or a motion and affidavit” that personal service cannot be made, and the court may then order substitute service. MCL 712A.13 also provides for substitute service; however, MCL 712A.13 does not require the court to make its findings based upon testimony or an affidavit. In *Zaherniak*, the petitioner was unable to personally serve the respondent with notice of the hearing on termination of parental rights. At a hearing in the respondent’s absence, the trial court suggested that the petitioner file an affidavit of diligent effort, and the court would order service by publication. The petitioner filed a motion for alternate service without a proper affidavit. The court did not take any testimony regarding the motion before issuing its order for service by publication. After publication, termination proceedings were held and the respondent’s parental rights were terminated. The respondent appealed, claiming that the court improperly allowed service by publication and therefore lacked jurisdiction over her. The respondent argued that the petitioner’s motion was defective because it failed to specify facts to support an order for substitute service.

The Court of Appeals held that MCL 712A.13, not MCR 3.920, controls the determination of whether a court has established jurisdiction over a respondent:

“We believe that MCL 712A.13 reflects our Legislature’s policy considerations concerning the necessary requirements for obtaining jurisdiction over a parent or guardian of a juvenile. Because the issue of service is a jurisdictional one, the statutory provision governs. The plain language of the statute contains no specific requirements concerning what types of evidence a court must consider in determining whether substitute service is indicated, or the form in which the evidence must be received. By its silence, MCL 712A.13 permits a court to evaluate evidence other than testimony or a motion and affidavit when determining whether notice can be made by substituted service. We believe that the recently amended court rule requirements now found in MCR 3.920(B)(4)(b) are restrictions affecting jurisdiction in matters that are usually time-sensitive and for which the Legislature’s policy is to seek prompt resolution for the sake of the juvenile involved, and as such conflict with MCL 712A.13. Therefore, the statute prevails.”

The Court of Appeals concluded that the trial court did not err in relying upon the petitioner’s motion for alternate service and documents in the court file regarding previous failures to serve the respondent.

CHAPTER 14

Paying the Costs of Child Protective Proceedings

14.2 Orders for Reimbursement of the Costs of Care or Services When a Child Is Placed Outside the Home

On page 334, insert the following text after the first paragraph in this section:

A stepfather does not qualify as a “custodian” for the purposes of ordering reimbursement pursuant to MCL 712A.18(2). In *In re Hudson*, ___ Mich App ___, ___ (2004), a stepfather was ordered to pay the cost of his stepdaughter’s care and legal representation. The Probate Code does not define “custodian.” However, the Court of Appeals noted that “custodian” has a specific legal meaning as provided in the Michigan Uniform Transfer to Minors Act, MCL 554.521 et seq. Under that act, “one does not become a ‘custodian’ without acquiring, under clearly articulated circumstances, legal possession of a minor’s property which is then held in trust for the child.” *Hudson, supra* at ___. The Court concluded that because the stepfather was not a financial ‘custodian’ as specifically defined in the Michigan Uniform Transfer to Minors Act, he could not be ordered to reimburse the court for the juvenile’s cost of care or out-of-home placement.

Update: Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Part A—Commentary

5.39 Setting Bail at the Conclusion of Preliminary Examination

Replace the quoted portion of MCL 765.6(1) at the bottom of page 51 with the following:

“Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:

“(a) The seriousness of the offense charged.

“(b) The protection of the public.

“(c) The previous criminal record and the dangerousness of the person accused.

“(d) The probability or improbability of the person accused appearing at the trial of the cause.”

Effective June 24, 2004, 2004 PA 167 eliminated language in MCL 765.6(1) requiring that bail “be uniform whether the bail bond is executed by the person for whom bail has been set or by a surety.” 2004 PA 167 added the following provision to MCL 765.6:

“(2) If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under subsection (1) and executed by a surety approved by the court.”

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.24 Motion to Dismiss Because of Double Jeopardy— Multiple Punishments for the Same Offense

Insert the following case summary before the last full paragraph on page 56:

Armed robbery and safe robbery are different offenses prohibited by statutes aimed at preventing different types of harm; therefore, a defendant's conviction and sentence for both offenses does not offend the defendant's double jeopardy protections. *People v Ford*, ___ Mich App ___, ___ (2004). In *Ford*, a defendant convicted of armed robbery, safe robbery, home invasion, and felony-firearm at a single trial appealed his convictions and sentences for both robbery charges on the basis that the convictions and sentences constituted multiple punishment for the same offense in violation of his constitutional protections against double jeopardy. *Ford, supra*, ___ Mich App at ___.

The *Ford* Court first noted that the Michigan Supreme Court's decision in *People v Nutt*, ___ Mich ___ (2004) (included in the June 2004 update), while signaling a return to the "same elements" test for determining whether double jeopardy protections prohibited successive prosecutions for the "same offense," did not address the multiple punishment prong of a defendant's double jeopardy protections. *Ford, supra*, ___ Mich App at ___ n 2. The *Blockburger* "same elements" test creates only a presumption that the "legislature intended multiple punishments where two distinct statutes cover the same conduct but each requires proof of an element the other does not; the contrary presumption arises when one offense's elements are encompassed in the elements of the other." *Ford, supra*, ___ Mich App at ___. Either presumption may be overcome by a clear legislative expression of contrary intent. *Ford, supra*, ___ Mich App at ___. The *Ford* Court explained:

"[U]nder both the federal and Michigan Double Jeopardy Clauses the test is the same: 'in the context of multiple punishment *at a*

single trial, the issue whether two convictions involve the same offense for purposes of the protection against multiple punishment is solely one of legislative intent.” *Ford, supra*, ___ Mich App at ___, quoting *People v Sturgis*, 427 Mich 392, 399 (1986).

With respect to ascertaining legislative intent, the *Ford* Court repeated principles set forth by the Michigan Supreme Court in *People v Robideau*, 419 Mich 458 (1984):

“Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments.” *Ford, supra*, ___ Mich App at ___, quoting *Robideau, supra* at 487–488.

The *Ford* Court applied both the *Blockburger* “same elements” test and the *Robideau* “type of harm” test to the facts before it and found that the defendant’s convictions and sentences for both armed robbery and safe robbery, obtained at a single trial and established by the same conduct, were different offenses prohibited by statutes intended to protect the public from different types of harm. *Ford, supra*, ___ Mich App at ___. That is, the defendant’s convictions were for two offenses each containing an element different from the other and obtained under statutes intended to prevent different types of harm.

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 4

Promoting Safety in Criminal Proceedings

4.4 Procedures for Issuing Conditional Release Orders

C. Required Findings by Judge or District Court Magistrate

Effective June 24, 2004, MCL 765.6 was amended by 2004 PA 167. Near the bottom of page 126, replace the quote of MCL 765.6(1) with the following:

“(1) Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:

“(a) The seriousness of the offense charged.

“(b) The protection of the public.

“(c) The previous criminal record and the dangerousness of the person accused.

“(d) The probability or improbability of the person accused appearing at the trial of the cause.

“(2) If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under subsection (1) and executed by a surety approved by the court.”

CHAPTER 9

Statutory Firearms Restrictions in Domestic Violence Cases

9.5 Restrictions Arising from Conviction of a Felony

B. Michigan Restrictions on the Purchase or Possession of Firearms by Convicted Felons

On page 404, after the quote of MCL 750.224f(6), insert the following text:

In *People v Perkins*, ___ Mich App ___, ___ (2004), the Court of Appeals held that larceny from a person, MCL 750.357, constitutes a “specified felony” for the purposes of MCL 750.224f. The Court stated:

“Because a person whose property is stolen from his presence may take steps to retain possession, and the offender may react violently, we conclude that the offense of larceny from a person, *‘by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.’* MCL 750.224f(6)(i). We therefore hold that larceny from a person is a specified felony within the meaning of MCL 750.224f.”

CHAPTER 12

Domestic Violence and Access to Children

12.4 Joint Custody

D. Joint Custody Agreements

After the first full paragraph on page 501, insert the following text:

The Michigan Supreme Court, in *Harvey v Harvey*, ___ Mich ___, ___ (2004), clarified the responsibilities of the trial court in making a custody determination under the Child Custody Act, MCL 722.21 et. seq. The Court held that under the Child Custody Act, the circuit court is *required* to determine the best interests of the children before entering an order resolving the custody dispute. The Court clarified that this does not require the trial court to conduct a hearing or otherwise engage in fact-finding when the parties agree to custody. The Court stated:

“However, the deference due parties’ negotiated agreements does not diminish the court’s obligation to examine the best interest factors and make the child’s best interests paramount. MCL 722.25(1). Nothing in the Child Custody Act gives parents or any other party the power to exclude the legislatively mandated ‘best interests’ factors from the court’s deliberations once a custody dispute reaches the court.”

July 2004

Update: Friend of the Court Domestic Violence Resource Book (Revised Edition)

CHAPTER 4

Custody and Parenting Time

4.1 The Best Interest Factors

Immediately before Section 4.2, in the middle of page 95, insert the following text:

When weighing the best interest factors, the court may also interview the child to determine if the child has a preference regarding custody. MCR 3.210(C)(5)* states:

“(5) The court may interview the child privately to determine if the child is of sufficient age to express a preference regarding custody, and, if so, the reasonable preference of the child. The court shall focus the interview on these determinations, and the information received shall be applied only to the reasonable preference factor.”

*Effective May 1, 2004.
Administrative Order 2002-13.

CHAPTER 4

Custody and Parenting Time

4.5 Joint Custody

D. Joint Custody Agreements

Insert the following text at the bottom of page 105:

The Michigan Supreme Court, in *Harvey v Harvey*, ___ Mich ___, ___ (2004), clarified the responsibilities of the trial court in making a custody determination under the Child Custody Act, MCL 722.21 et. seq. The Court held that under the Child Custody Act, the circuit court is *required* to determine the best interests of the children before entering an order resolving the custody dispute. The Court clarified that this does not require the trial court to conduct a hearing or otherwise engage in fact-finding when the parties agree to custody. The Court stated:

“However, the deference due parties’ negotiated agreements does not diminish the court’s obligation to examine the best interest factors and make the child’s best interests paramount. MCL 722.25(1). Nothing in the Child Custody Act gives parents or any other party the power to exclude the legislatively mandated ‘best interests’ factors from the court’s deliberations once a custody dispute reaches the court.”

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 6

Notice and Time Requirements in Delinquency Proceedings

6.5 Issuance and Service of Summons

B. Manner of Service of Summons

Near the middle of page 121, insert the following paragraph immediately before subsection (C):

In *In re Zaherniak*, ___ Mich App ___, ___ (2004), the Court of Appeals discussed an apparent conflict between MCR 3.920 and MCL 712A.13. MCR 3.920(B)(4)(b) provides that the court may find “on the basis of testimony or a motion and affidavit” that personal service cannot be made, and the court may then order substitute service. MCL 712A.13 also provides for substitute service; however, MCL 712A.13 does not require the court to make its findings based upon testimony or an affidavit. In *Zaherniak*, the petitioner was unable to personally serve the respondent with notice of the hearing on termination of parental rights. At a hearing in the respondent’s absence, the trial court suggested that the petitioner file an affidavit of diligent effort, and the court would order service by publication. The petitioner filed a motion for alternate service without a proper affidavit. The court did not take any testimony regarding the motion before issuing its order for service by publication. After publication, termination proceedings were held and the respondent’s parental rights were terminated. The respondent appealed, claiming that the court improperly allowed service by publication and therefore lacked jurisdiction over her. The respondent argued that the petitioner’s motion was defective because it failed to specify facts to support an order for substitute service.

The Court of Appeals held that MCL 712A.13, not MCR 3.920, controls the determination of whether a court has established jurisdiction over a respondent:

“We believe that MCL 712A.13 reflects our Legislature’s policy considerations concerning the necessary requirements for obtaining jurisdiction over a parent or guardian of a juvenile. Because the issue of service is a jurisdictional one, the statutory provision governs. The plain language of the statute contains no specific requirements concerning what types of evidence a court must consider in determining whether substitute service is indicated, or the form in which the evidence must be received. By its silence, MCL 712A.13 permits a court to evaluate evidence other than testimony or a motion and affidavit when determining whether notice can be made by substituted service. We believe that the recently amended court rule requirements now found in MCR 3.920(B)(4)(b) are restrictions affecting jurisdiction in matters that are usually time-sensitive and for which the Legislature’s policy is to seek prompt resolution for the sake of the juvenile involved, and as such conflict with MCL 712A.13. Therefore, the statute prevails.”

The Court of Appeals concluded that the trial court did not err in relying upon the petitioner’s motion for alternate service and documents in the court file regarding previous failures to serve the respondent.

CHAPTER 11

Paying the Costs of Juvenile Proceedings

11.2 Orders for Reimbursement of the Costs of Care or Services When a Juvenile Is Placed Outside the Home

Insert the following text after the last paragraph on the bottom of page 270:

A stepfather does not qualify as a “custodian” for the purposes of ordering reimbursement pursuant to MCL 712A.18(2). In *In re Hudson*, ___ Mich App ___, ___ (2004), a stepfather was ordered to pay the cost of his stepdaughter’s care and legal representation. The Probate Code does not define “custodian.” However, the Court of Appeals noted that “custodian” has a specific legal meaning as provided in the Michigan Uniform Transfer to Minors Act, MCL 554.521 et seq. Under that act, “one does not become a ‘custodian’ without acquiring, under clearly articulated circumstances, legal possession of a minor’s property which is then held in trust for the child.” *Hudson, supra* at ___. The Court concluded that because the stepfather was not a financial ‘custodian’ as specifically defined in the Michigan Uniform Transfer to Minors Act, he could not be ordered to reimburse the court for the juvenile’s cost of care or out-of-home placement.

Update: Sexual Assault Benchbook

CHAPTER 5

Bond and Discovery

5.4 Procedures for Issuing Conditional Release Orders

C. Required Findings by Judge or District Court Magistrate

Effective June 24, 2004, MCL 765.6 was amended by 2004 PA 167. Replace the quote of MCL 765.6(1) in the middle of page 253 with the following:

“(1) Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:

“(a) The seriousness of the offense charged.

“(b) The protection of the public.

“(c) The previous criminal record and the dangerousness of the person accused.

“(d) The probability or improbability of the person accused appearing at the trial of the cause.

“(2) If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under subsection (1) and executed by a surety approved by the court.”